Filed 2/8/10 Avina v. Gerro CA2/8

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

SAL AVINA, Plaintiff and Appellant, v. JOHN M. GERRO, Defendant and Respondent.	B204350 (Los Angeles County Super. Ct. No. PC038490) B205705 (Los Angeles County Super. Ct. No. EC045502)

APPEALS from judgments of the Superior Court of Los Angeles County. John P. Farrell, Judge. Case No. B204350 is affirmed. Case No. B205705 is dismissed.

Sal Avina, in pro. per., for Plaintiff and Appellant.

Law Office of Ethan D. Baker, Ethan D. Baker, and Patricia Venegas for Defendant and Respondent.

* * * * * * * * *

INTRODUCTION

Appellant Sal Avina appeals from judgments entered against him in the two actions brought against respondent, attorney John M. Gerro. The first action -- for attorney malpractice -- ended in summary judgment. The second action, alleging breach of contract, fraud, negligent misrepresentation, and breach of fiduciary duty, ended in a judgment of dismissal after the trial court sustained respondent's demurrer without leave to amend, on the ground that the judgment in the first action barred the second. We consider the two appeals together for purposes of oral argument and decision.

In appeal case No. B204350 (the first action), we find no triable issue of fact as to causation, and affirm the summary judgment. As lack of causation is dispositive, we do not reach the other grounds for the motion, or other issues raised by appellant.

With regard to appeal case No. B205705 (the second action), appellant purports to appeal from an order sustaining demurrers without leave to amend. Because that order is not appealable, and appellant failed to obtain an appealable judgment after he was notified to do so, we dismiss the appeal.

BACKGROUND

1. *The Summary Judgment Motion (Appeal Case No. B204350)*

Appellant commenced his malpractice action against respondent on March 29, 2006, in Los Angeles Superior Court case No. PC038490. The complaint alleged that appellant retained respondent to prosecute an action against Manuel Quintero for specific performance of a real estate purchase agreement. Respondent filed the underlying specific performance action in Los Angeles Superior Court case No. PC034363 (Quintero action). The Quintero action went to trial on February 7, 2005, and resulted in a judgment in Quintero's favor.[1]

---

[1] The judgment in the Quintero case, No. PC034363, was affirmed on appeal in an unpublished opinion. (See *Avina v. Quintero* (June 20, 2006, B181784) [nonpub. opn.].)

The malpractice complaint alleged that respondent negligently failed to present available evidence necessary to prevail in the trial or to record a lis pendens, that he negligently failed to attach the appropriate documents to a motion for new trial, and that he then abandoned appellant by forging appellant's signature to a substitution of attorney form and filing it with the court on or about March 2, 2005. The complaint alleged that as a result of respondent's negligence and wrongdoing, appellant lost at trial, the motion for new trial was denied, and judgment was entered against appellant for costs and attorney fees.

In August 2007, respondent filed a motion for summary judgment in the malpractice action, asserting that appellant would be unable to establish causation, because appellant's loss in the Quintero action had been due to his own breach of contract, and that the one-year statute of limitations set forth in Code of Civil Procedure section 340.6 had run.

In support of his motion for summary judgment, respondent alleged that the following averments were material and undisputed facts:[2]

> "1. On January 22, 2004, Avina filed a verified complaint against Defendant Manuel Quintero, which complaint is comprised of the following three causes of action: (1) breach of contract (2) specific performance and (3) declaratory relief. . . .
>
> "2. Attorney John Gerro represented Avina in the trial of the Underlying Action.
>
> "3. Attached to the verified complaint and incorporated therein is a copy of the 'Residential Purchase Agreement and Joint Escrow Instructions' (hereinafter the 'Purchase Agreement').
>
> "Paragraph 2A of the Purchase Agreement states:
>
> "'INITIAL DEPOSIT: Buyer has given a deposit in the amount of $5000.00 . . . to the agent submitting the offer. . . .'
>
> "Paragraph 14C(3) of the Purchase Agreement States:

---

[2] We have included only those facts relating to the issue of causation, and we have omitted averments that were mere conclusions. (See *Quiroz v. Seventh Ave. Center* (2006) 140 Cal.App.4th 1256, 1271; *Kelley v. Trunk* (1998) 66 Cal.App.4th 519, 524.)

"'Seller right to cancel; Buyer contract Obligations: Seller, after first giving Buyer a Notice to perform . . . may cancel this agreement in writing and authorize a return of Buyer's deposit for any of the following reasons: (I) If Buyer fails to deposit funds as required by 2A or 2B; (ii) if the funds deposited are not good when deposited. . . .'

"Paragraph 24 of the Purchase Agreement provides:

"'Neither this agreement, nor any provision in it may be extended, amended, altered or changed, except in writing signed by the Buyer and Seller.'

"4. At no time did Avina deposit good funds in the sum of $5000.00 with the escrow company.

"5. The parties to the Purchase Agreement never signed a writing which modified the terms of the Purchase Agreement.

"6. The trial court in the underlying action rejected the contention that the MLS [Multiple Listing Service] Listing Form qualified as a writing signed by Buyer and Seller which modified the Purchase Agreement.

"7. The trial court in the Underlying Action granted the Defendant's motion for nonsuit and rendered judgment against Avina as the result of Avina's failure to tender the deposit required by the Purchase Agreement. . . ."[3]

On September 20, 2007, the trial court granted the motion for summary judgment. The court found that respondent had produced evidence showing that appellant had breached the Quintero real estate contract by failing to perform his contractual obligation to deposit $5,000, and that appellant failed to raise a triable issue of fact by producing evidence that he had made such deposit or attempted to present a check backed by sufficient funds within the required period. The court further found that appellant had

---

[3] The exhibits supporting respondent's statement of undisputed facts were omitted from the clerk's transcript and were not included in the augmentation ordered by this court. We therefore granted appellant's request for judicial notice of the superior court file.

Fact Nos. 1, 2, 3, 5, 6, 10, 13, and 14 were undisputed. Appellant disputed fact Nos. 4, 7, 8, 9, 11, 12, and 15.

presented no evidence to show that he had been ready, willing, and able to complete the real estate sale, and that he presented no evidence of respondent's malpractice.[4] Judgment was entered against appellant the same day, and respondent served a notice of entry of judgment on October 4, 2007. Appellant filed a timely notice of appeal on December 4, 2007.

2. *The Demurrer (Appeal Case No. B205705)*

On August 20, 2007, after filing opposition to the motion for summary judgment in the malpractice action, appellant filed a new action in Los Angeles Superior Court case No. EC045502, alleging breach of contract, fraud, negligent misrepresentation, and breach of fiduciary duty. Among other things, the complaint alleged that respondent represented appellant in the action against Quintero solely to generate fees, concealing from appellant the fact that the case had no merit, while assuring him that it was a meritorious action. The complaint further alleged that respondent "undertook no investigation, conducted no discovery, made no contact with witnesses, issued no subpoenas, and failed to prepare for trial."

After the motion for summary judgment was granted in the malpractice action, respondent demurred to the complaint in the fraud action on the ground of res judicata. The trial court found that the fraud action alleged the same primary right as the malpractice action, and based upon the summary judgment in the malpractice action, sustained the demurrer without leave to amend. No judgment was filed in the second action, and the court did not sign the minute order.

---

[4] Disproving professional negligence requires the submission of expert testimony regarding the standard of care and whether the defendant met that standard. (*Crouse v. Brobeck, Phleger & Harrison* (1998) 67 Cal.App.4th 1509, 1534-1535.) By not submitting the declaration of an expert and directing his motion solely to causation, he has, in essence, conceded professional negligence -- at least for the purposes of the motion for summary judgment.

DISCUSSION

1. *Summary Judgment Was Proper*

We review de novo the trial court's decision to grant summary judgment, "considering all the evidence set forth in the moving and opposition papers except that to which objections were made and sustained. [Citations.]" (*Johnson v. City of Loma Linda* (2000) 24 Cal.4th 61, 65-66; Code Civ. Proc., § 437c, subd. (c).) Under a de novo review, we exercise "an independent assessment of the correctness of the trial court's ruling, applying the same legal standard as the trial court in determining whether there are any genuine issues of material fact or whether the moving party is entitled to judgment as a matter of law." (*Iverson v. Muroc Unified School Dist*. (1995) 32 Cal.App.4th 218, 222; § 437c, subd. (c).)

A defendant who moves for summary judgment must make a prima facie showing of the nonexistence of any triable issue of material fact, by producing evidence to show either that one or more elements of the plaintiff's cause of action cannot be established, or that there is a complete defense to the action. (Code Civ. Proc., § 437c, subd. (o)(2); *Aguilar v. Atlantic Richfield Co*. (2001) 25 Cal.4th 826, 850.) If the moving defendant successfully makes a prima facie showing, the burden then shifts to the plaintiff to make a prima facie showing of the existence of a triable issue of material fact. (§ 437c, subd. (p)(2); *Aguilar*, at p. 850.)

The issues in a motion for summary judgment are framed by the pleadings. (*Aguilera v. Henry Soss & Co*. (1996) 42 Cal.App.4th 1724, 1728.) Here, the malpractice complaint alleged that respondent negligently failed to present available evidence necessary to prevail in the trial, that he negligently failed to attach the appropriate documents to a motion for new trial, and that he then abandoned appellant by forging appellant's signature to a substitution of attorney form and filing it with the court on or about March 2, 2005.[5] Respondent's negligence and wrongdoing allegedly caused

---

[5] Appellant retracted the charge that respondent forged his signature, but stated in his declaration that respondent continued to represent him after filing the substitution of attorney form.

appellant's loss at trial and the denial of the motion for new trial. The negligence and wrongdoing also allegedly resulted in a judgment against appellant for costs and attorney fees. Respondent's primary effort in the motion for summary judgment was to make a prima facie showing that appellant would not be able to prove causation.

The elements of a legal malpractice claim arising from a civil proceeding are "(1) the duty of the attorney to use such skill, prudence, and diligence as members of his or her profession commonly possess and exercise; (2) a breach of that duty; (3) a proximate causal connection between the breach and the resulting injury; and (4) actual loss or damage resulting from the attorney's negligence. [Citations.]" (*Coscia v. McKenna & Cuneo* (2001) 25 Cal.4th 1194, 1199.) The causation element requires a plaintiff to show "but for the alleged negligence of the defendant attorney, the plaintiff would have obtained a more favorable judgment or settlement in the action in which the malpractice allegedly occurred." (*Viner v. Sweet* (2003) 30 Cal.4th 1232, 1241, italics omitted.) The lack of causation is rarely decided on summary judgment, but may be decided as a question of law if reasonable minds could not differ as to the legal effect of the evidence presented. (*Kurinij v. Hanna & Morton* (1997) 55 Cal.App.4th 853, 864.) This is such a case.

The Quintero action was one for breach of a real estate contract and specific performance of the contract. In his motion, respondent established that the contract required appellant to deposit $5,000 in escrow by December 16, 2003, that the parties to the contract did not sign a written modification of that term, and that the trial court rejected a contention that an MLS form, signed by both buyer and seller, qualified as such a modification. Respondent argued that the Quintero court granted nonsuit solely due to appellant's own breach of contract by failing to deposit good funds to the extent of the full $5,000 by the deadline.

Respondent sought to show that appellant's loss in the Quintero action was due to appellant's own failure to perform a term of his contract with Quintero. To be entitled to

specific enforcement of a contract, a plaintiff must plead and prove that he was ready, willing and able to perform, or that he was prevented by the defendant from performing the contract. (*Ninety Nine Investments, Ltd. v. Overseas Courier Service (Singapore) Private, Ltd*. (2003) 113 Cal.App.4th 1118, 1126.) Similarly, to recover damages for a breach of contract, a plaintiff must prove that he performed his part of the agreement, or that his nonperformance was excused. (*Wall Street Network, Ltd. v. New York Times Co*. (2008) 164 Cal.App.4th 1171, 1178.)[6]

Appellant's own admissions established that he had no cause of action against Quintero. In deposition in this case, appellant admitted that he tendered no more than $3,000, not the required $5,000, prior to the deadline. In response to the motion for summary judgment, appellant submitted two declarations. In one, he stated that the attorney for the escrow company waived the requirement of a certified check and told appellant to make the deposit with a "good check." He stated that in mid-December, but sometime after December 17, 2003, and after the escrow officer rejected his $3,000 check, he attempted to tender a $5,000 check with insufficient funds. When that check was rejected, appellant's loan officer tendered the same check, but it was again rejected.

Thus, appellant has admitted that he did not perform his part of the contract, and he was not entitled to specific enforcement or damages for its breach. (See *Wall Street Network, Ltd. v. New York Times Co*., *supra,* 164 Cal.App.4th at p. 1178; *Ninety Nine Investments, Ltd. v. Overseas Courier Service*, *supra*, 113 Cal.App.4th at p. 1126.) Thus, respondent established that appellant would not be able to prove that respondent's negligence was the cause of his loss to Quintero, and appellant failed to raise a triable issue of fact. We conclude that the trial court did not err in granting summary judgment.

---

6 The complaint that respondent filed in the Quintero action did not allege the averments necessary to comply with the prerequisites to the enforcement of a contract, and respondent's motion begins with the implied concession that he prosecuted an action in which no witnesses would be able to testify that appellant performed his part of the contract.

2. *Appeal Case No. B205705 Must Be Dismissed*

Respondent's prosecution of allegedly frivolous action in the Quintero matter may have been a breach of his fiduciary duty toward appellant. (See *Dawson v. Toledano* (2003) 109 Cal.App.4th 387, 396 [frivolous appeal].) Appellant did not allege a breach of fiduciary duty in the malpractice action, or seek leave to amend the malpractice complaint prior to the entry of summary judgment. Rather, he filed a separate lawsuit alleging breach of contract, fraud, negligent misrepresentation, and breach of fiduciary duty. The new complaint alleged that respondent represented appellant in the action against Quintero action solely to generate fees, concealing from appellant the fact that the case had no merit, while assuring him that it was meritorious.

Sustaining respondent's demurrer to the new complaint without leave to amend, the trial court found that it alleged the same cause of action as the malpractice action.[7] The court held that since summary judgment had been entered in the malpractice action, the new action was barred under the doctrine of res judicata. (See generally, *Mycogen Corp. v. Monsanto Co*. (2002) 28 Cal.4th 888, 904.)

Appellant has appealed from an unsigned minute order sustaining the demurrer without leave to amend. "An order sustaining a demurrer without leave to amend is *not* an appealable order; only a judgment entered on such an order can be appealed." (*I. J. Weinrot & Son, Inc. v. Jackson* (1985) 40 Cal.3d 327, 331; see Code Civ. Proc., § 904.1.) "All dismissals ordered by the court shall be in the form of a written order signed by the court and filed in the action. . . ." (Code Civ. Proc., § 581d.) An unsigned minute order cannot be treated as an appealable judgment. (*Ibid.*; *Brehm v. 21st Century Ins. Co.* (2008) 166 Cal.App.4th 1225, 1233-1234.)

We continued oral argument on our own motion, and on November 19, 2009, issued an order to show cause (OSC) why the appeal should not be dismissed, giving

---

[7] In general, an injury suffered by reason of an attorney's malpractice in a single matter gives rise to just one cause of action, whether pleaded as negligence, breach of contract, fraud, negligent misrepresentation, or breach of fiduciary duty. (*Quintilliani v. Mannerino* (1998) 62 Cal.App.4th 54, 69; *Kracht v. Perrin, Gartland & Doyle* (1990) 219 Cal.App.3d 1019, 1022-1023.)

appellant the opportunity, in the alternative, to file a conformed copy of the judgment. We granted appellant one additional extension of time, but denied appellant's request for a third. On January 8, 2010, appellant timely filed a written response to the OSC, but did not file a conformed copy of a judgment of dismissal.

In response to the OSC, appellant acknowledged that no judgment of dismissal has been entered, and blamed opposing counsel and the trial judge, suggesting that placing the blame for procedural errors on others will excuse the requirement that judgments of dismissal must be signed by the trial court. It is not within our discretion to excuse the absence of an appealable judgment. "The existence of an appealable judgment is a jurisdictional prerequisite to an appeal." (*Jennings v. Marralle* (1994) 8 Cal.4th 121, 126.) As none has been filed in this case, we have no jurisdiction to consider appeal case No. B205705, and must dismiss it. (See *Munoz v. Florentine Gardens* (1991) 235 Cal.App.3d 1730, 1732.)

DISPOSITION

The judgment in Los Angeles Superior Court case No. PC038490 is affirmed. Appeal case No. B205705 from Los Angeles Superior Court case No. EC045502 is dismissed. Respondent shall have costs on appeal.

LICHTMAN, J.*

We concur:

RUBIN, ACTING P.J. BIGELOW, J.

---

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.